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# Abuse of the Pardon Power: A Legal and Economic Perspective

Jaired Stallard\*

## I. INTRODUCTION

In light of the recent controversy surrounding former President Clinton's pardons of Marc Rich and others whom the public perceived to be "unworthy" of a pardon,<sup>1</sup> questions arise about the proper scope and the appropriate use of the pardon power. However, this is not the first time this power has been questioned and is not likely to be the last. In recent times, Presidents Ford,<sup>2</sup> Carter,<sup>3</sup> and George Bush, Sr.<sup>4</sup> were all criticized for pardons they granted. Why would a President grant a controversial pardon during his last days in Washington, when most Presidents spend time during the last few months in the oval office trying to solidify the legacy of their presidency? Although this question is puzzling, an application of economic principles to the decision making process of a President can shed light on the reasons pardons are granted.

The purpose of this article is to use economic principles to analyze the use of the pardon power. Economic models that illustrate the preferences of a President highlight the situations in which a President

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1. Many different forms of pardons and derivatives of the pardon power have been granted including general pardons, conditional pardons, and amnesties. The purpose of this paper is to describe why the President decides to grant a pardon, in any of its many forms. An explanation of the history and use of each of these different pardons is beyond the scope of this article.

2. See James Warren, *Nixon's Hoffa pardon Has an Odor*, CHI. TRIB., April 8, 2001, § 2, at 3. Warren states that the pardon granted by Nixon to Hoffa was "heavily influenced by self-serving . . . political considerations involving his [Nixon's] 1972 re-election campaign." *Id.* For more information on the facts of the Hoffa pardon see Leonard Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power been Exceeded?*, 48 U. COLO. L. REV. 1, 21-34 (1976).

3. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 617 (1991). President Ford's pardon of Nixon is agreed to be a contributing factor in Ford's 1976 Presidential Election defeat. Ford's approval rating was 66% before the pardon of Nixon and 50% following the pardon. See Boudin *supra* note 2, at 2 n. 9.

4. See *Walsh Soldiers On*, TIME, Feb. 22, 1993, at 15. Independent Counsel Lawrence Walsh stated that the granting of six pardons to individuals involved in the Iran-Contra Affair were politically motivated, prevented Bush from testifying as a witness in the trials of the individuals, and was a "grave disservice" to the country. *Id.*

is most likely to abuse this power and can aide lawmakers in reforming the unchecked power to pardon.

In order to apply economic principles to the pardon power, a number of issues must be examined. First, it is necessary to analyze the pardon power itself, and the appropriate uses of this executive power as outlined by the framers and the judiciary.<sup>5</sup> This analysis establishes the appropriate uses of the pardon power.

The next step is to analyze the traditional economic principles used to interpret political actions; a discipline referred to as Public Choice.<sup>6</sup> The economic tools used to interpret the use of the pardon power are defined in this step.

In order to understand the benefits that a President gains from issuing a pardon, a paradigm within Public Choice, called rent-seeking, has emerged to explain transfers of wealth between individuals through political means, and is helpful in determining why pardons have been granted.<sup>7</sup> This paradigm has been applied to Congressmen and is instructive on the reasons pardons are granted.<sup>8</sup>

After exploring these areas, and with the use of basic economic principles, models can be generated to explain the number of pardons granted, the costs and benefits associated with the grant of a pardon, and the incentives for a President to grant a pardon.<sup>9</sup>

The models then can be used to explain why a President grants pardons and can be used to predict when any pardon, even a controversial pardon, may be granted.<sup>10</sup> The economic analysis of the pardon power will highlight the current problems of this unchecked power, and possible reforms will be addressed.<sup>11</sup>

## II. BACKGROUND

In order to conduct an analysis of the presidential pardon power and consequently, its effect on society and the economy, one must first acquire an understanding of the power itself. Part A provides a his-

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5. See *infra* notes 122 -533 and accompanying text (providing background information on the subject of pardon power).

6. See *infra* notes 544 -67 and accompanying text (setting forth background information on public choice).

7. See *infra* notes 68-79 and accompanying text (discussing rent-seeking).

8. See *infra* notes 800-1033 and accompanying text (examining Congressional implications of rent-seeking).

9. See *infra* notes 1044-1500 and accompanying text (analyzing the following three economic models: "Societal Demand for Pardons Model," "Demand for Services of a President After Service in Office Model" and "Maximizing Profits by Selling Pardons Model").

10. See *infra* notes 1511-1633 and accompanying text.

11. See *infra* notes 1644-1833 and accompanying text (discussing the possibility for reform).

torical background of the pardon power. Part B examines the theory of 'Public Choice'. Part C focuses on a particular concept of Public Choice known as 'rent-seeking'. Part D concludes with a recognition of the congressional implications that 'rent-seeking' creates.

### A. *Pardon Power*

Before applying economic principles to the presidential pardon power, the basis of the demand for pardons must be determined. A historical analysis of the rationale for pardons, the early use of the power, and the public policy allowing great deference to the president must be explored in order to understand how the societal demand for pardons is determined. Furthermore, the role of the judiciary in defining the scope of this power must be discussed.

At the Constitutional Convention in Philadelphia, the founders contemplated what role the pardon power would play in America.<sup>12</sup> Both the Virginia and New Jersey Plans, which are considered the major plans of the convention, omitted the power of pardon.<sup>13</sup> Surprisingly, the pardon power was not hotly debated. There is only evidence of a few verbal exchanges and a couple of motions filed in the debate surrounding pardons.<sup>14</sup> The bulk of the discussion surrounding this section of the proposed Constitution focused on the appropriate branch to delegate the power and the possible limitations of it.<sup>15</sup>

Alexander Hamilton<sup>16</sup> and James Iredell<sup>17</sup> were avid supporters of the pardon power and fought for the inclusion of this power in the Constitution. Hamilton initially proposed that the chief executive "have the power of pardoning all offenses except Treason; which he

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12. See *infra* notes 16-255 and accompanying text. Shortly after the Revolutionary War, delegates from each colony assembled to form a "more perfect union." The Convention in Philadelphia was not the first to discuss a national constitution, however, the work of the men at this convention resulted in the modern day Constitution of the United States. *Id.*

13. See William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501 (1977).

14. See Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 786 (1996).

15. See Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 205 (1999).

16. See JAMES FARRAD, *FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 29 (1951). Hamilton represented the state of New York at the Convention and is credited for inspiring the eventual president, George Washington, to attend. Hamilton was appointed by Washington to be the Secretary of Treasury and was intimately involved in halting the Whiskey Rebellion, the source of the first presidential pardons. See *infra* note 31 and accompanying text.

17. See CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 303 (1966). Iredell was selected to be one of six delegates from North Carolina. All of the delegates from North Carolina were reluctant to sign the Constitution but were eventually persuaded to sign in 1789. Iredell served in the newly formed government as a Supreme Court Justice. *Id.*

shall not pardon without the approbation or rejection of the Senate.”<sup>18</sup>

The Report of the Committee of Detail<sup>19</sup> agreed with Hamilton that the President should possess this power but changed the text, reflecting the language of the pardon provision in the Act of Settlement of 1701,<sup>20</sup> which stated that the President could grant pardons except in the case of impeachment.<sup>21</sup> Both Roger Sherman<sup>22</sup> and Luther Martin<sup>23</sup> introduced motions to limit the power, but were rejected.<sup>24</sup> With little opposition, Article II, Section 2 was passed, stating the President “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>25</sup>

Hamilton and Iredell’s defense of this provision prior to the adoption of the Constitution is instructive on the intent of the framers and on how the demand for pardons was created. Hamilton reasoned that, “a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body” and that

18. See, Kobil, *supra* note 3, at 590 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23 (M. Farrand ed. 1911)).

19. See CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at 192 (1966). The Committee of Detail was set up in July of 1787 to put the “suggestions, amendments and propositions [of the convention] into a workable agreement. The Committee was composed of five elected delegates and were given eleven days to compose a revised version of the Virginia Plan.” *Id.*

20. See Kalt, *supra* note 144, at 784 n. 40.

21. U.S. CONST. art. II, § 2. cl. 1 (stating that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”) *Id.*

22. See FARRAD, *supra* note 16 at 34. Sherman was one of the delegates from Connecticut and served as the mayor of New Haven. He was one of the oldest delegates, 61, and had signed the Declaration of Independence. Although Sherman opposed many of the provisions of the Constitution, most notably the Bill of Rights, he eventually signed. *Id.*

23. *Id.* at 36. Martin represented Maryland at the convention and had a reputation of being a committed anti-nationalist because of his devotion to the sovereignty of his state. See also Bowen, *supra* note 19, at 293. Martin refused to sign the Constitution. He stated that Maryland considered “the proposed form of government very defective, and that the liberty and happiness of the people will be endangered if the system not be greatly changed and altered.” *Id.*

24. See Dunker, *supra* note 13, at 501. Roger Sherman introduced a motion to limit the pardon power “to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate” but this was rejected because it was feared that this would give the Senate too much power. Luther Martin also wanted to limit the power by inserting the words “after conviction” following “reprieves and pardons.” This motion was withdrawn when it was noted that a pardon before a conviction might be needed in the special case of obtaining the testimony of accomplices. *Id.*

25. U.S. CONST. art. II, § 2. cl. 1.

"in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."<sup>26</sup> The timing of pardoning seemed to be a very important factor for Hamilton. He reasoned that one man can certainly come to a decision quicker than a group of people, such as the legislative branch, and he believed this could be very crucial, particularly in a time of uprising.<sup>27</sup> From this statement, it is clear Hamilton believed uniting the country in times of hostility was the most important use of the power.<sup>28</sup>

Iredell concurred with Hamilton and believed that uniting the country was a proper application of this power, but he also expressed the need for pardon power to create flexibility in the criminal justice system. He stated that, "it will often happen in every country that men are obnoxious to a lawful conviction, who yet are entitled, from some favorable circumstances in their case, to be merciful interposition in their favor."<sup>29</sup> This rationale for pardoning was based on the assumption that the judicial branch may have, from time to time, excessively punished those convicted of a crime.

The founders included the pardon power in the Constitution because they believed there was a societal demand. Society, as a whole, would be better off if the President was allowed to pardon individuals to quell uprisings in a timely fashion and to remedy excessive punishment imposed by the judiciary. The founders' faulty assumption, however, was that the President would only use the power for the society as a whole, and not for individual self-maximization.<sup>30</sup>

The early use of the pardon power reflected the founders' intent. In 1795, President George Washington granted pardons to many of those involved in the Whiskey Rebellion.<sup>31</sup> Similarly, President Adams

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26. THE FEDERALIST NO. 74, at 449 (Alexander Hamilton).

27. *Id.*

28. *Id.*

29. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 350 (1968).

30. *Id.* Iredell stated that he "entirely lay out of consideration of the probability of a man honored in such a manner by his country, risking . . . the damnation of his fame to all future ages." *Id.* See also Hamilton, *supra* note 26. Hamilton described the pardon power had as a "benign prerogative." *Id.*

31. See STEVE BOYD, THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES 1-7 (1985). In 1791 a tax was levied on the production of whiskey to help pay off the nation's war debt. This tax was placed on producers and was collected prior to realization of profit in the market place, severely hindering the financial positions of the farmers who produced the whiskey. In July of 1794, John Neville, an inspector for the Western Region of Pennsylvania, was attacked and his home was torched and burned. A few weeks after the attack, 7,000 farmers marched through the streets of Pittsburgh protesting the tax. President Washington was forced to call upon 15,000 militiamen to quell the rebellion. The soldiers marched west; however, few

pardoned persons involved in an uprising in Pennsylvania.<sup>32</sup> In 1800, however, scholars believe the first pardons were given for personal benefit of the President. The Jeffersonian Republicans were defeated in the presidential election and just before leaving office, Jefferson pardoned all persons sentenced and convicted under the Alien and Sedition Act (the "Act").<sup>33</sup> The Federalists had used this Act, in violation of the First Amendment, to silence the Republicans. Although this seemingly was a permissible use to "unite the country," Jefferson did not object to prosecution of Federalist judges, editors, and publishers for libeling the United States and Jefferson.<sup>34</sup> This fact could verify that Jefferson's actions were for political rather than societal reasons.<sup>35</sup>

The role of the President, in general, has greatly expanded from the original ideals of the framers. The founders "assumed that the president would be a political eunuch, with the duty of only assuring that the laws passed by Congress, which is where the political action would occur, be faithfully executed."<sup>36</sup> Since the presidency of Franklin D. Roosevelt, the President has executed powers that the legislative and judicial branches and possibly even the electorate may have otherwise rejected.<sup>37</sup> A scholar further stated that "[t]he expansion of presidential power, and the public acceptance of that expansion, has produced public expectations that the President will take charge of the most important issues facing the nation."<sup>38</sup>

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insurgents were found. Only a few rebels were captured and eventually charged and convicted of treason against the United States. *Id.*

32. See JOHN FERLING, *JOHN ADAMS: A LIFE* 373-395 (1992). This uprising, referred to as Fries' Rebellion, stemmed from an increase in taxes on homeowners. Many homeowners refused to pay the taxes and were incarcerated. John Fries led a mob of approximately 150 men to the Bethlehem jail and freed the evaders. Fries was sentenced to death for his involvement in the uprising but was pardoned because Adams did not believe Fries sought to overthrow the government. *Id.*

33. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 115-116 (1994). The Alien and Sedition Act were actually composed of four different acts. The Alien Act contained three different acts: 1) The Naturalization Act, which raised the residency requirement for citizens from five to fourteen years; 2) The Alien Enemies Act, which empowered a President to banish aliens of enemy countries during war times; and 3) The Alien Friends Act, which authorized the President to deport aliens who were dangerous to the peace and safety of the United States. The Sedition Act made it criminally punishable to publish "any false, scandalous and malicious writing." *Id.*

34. See LENARD LEVY, *JEFFERSON AND CIVIL LIBERTIES* 163 (1963).

35. *Id.*

36. See Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform*, 33 *NEW ENG. L. REV.* 907, 912 (1999)

37. ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE*, 99 (1981)

38. *Id.*

The effect this has on the societal demand for the pardon power is substantial.<sup>39</sup> Due to the fact that the public believes the actions of the president take into account “the most important issues facing the nation,”<sup>40</sup> great deference is given to presidential decisions regarding the granting of pardons. The exclusive power to grant pardons, coupled with the public’s great deference of presidential decisions, creates a large area for possible abuse by the chief executive.

Judicial interpretation has played an important role in the development of the pardon power. The Supreme Court first looked at the pardon power in *United States v. Wilson*.<sup>41</sup> Chief Justice Marshall defined a pardon as “an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he committed.”<sup>42</sup>

After the Civil War, President Lincoln issued pardons to those who fought against the Union.<sup>43</sup> Although it was not necessary, Congress passed a statute authorizing President Lincoln’s use of the pardon power.<sup>44</sup> A few years later, when the Johnson administration<sup>45</sup> began issuing more conditional pardons, Congress sought to restrict the pardon power through legislation.<sup>46</sup> They believed President Johnson was abusing his power and repealed the statute.<sup>47</sup> The judiciary was called upon to determine if Congress could limit the President’s use of the pardon power.

In *Ex parte Garland*, the Supreme Court upheld the President’s unconditional power to grant pardons.<sup>48</sup> Speaking for the Court, Justice

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39. See *infra* notes 10808-1411 and accompanying text (analyzing the “Societal Demand for Pardons Model”).

40. See *supra* note 37, at 99.

41. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833) (holding that the pardon was not applicable to the present conviction of the defendant because it was not brought judicially before the court by motion or plea; thus, the trial court was unable to take judicial notice of it).

42. *Id.* at 160.

43. See Kobil, *supra* note 3, at 593 n. 148. The pardons granted by Lincoln were conditional; those who were granted pardons were required to pledge their allegiance to the Union.

44. See *id.* at 593 n.149; see also Act of July 17, 1862, ch. 195, § 13, 12 Stat. 589, 592, *repealed* by Act of Jan. 21, 1867, ch. 8, 14 Stat. 377 (“[T]he President is hereby authorized, at any time hereafter, by proclamation, to extend to person who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.”).

45. *Id.* at 593.

46. *Id.* at 593 n.151. See Act of Jan. 21, 1867, ch. 8, 14 Stat. 377. The Act attempted to limit the power of the President by repealing Act of July 17, 1862, ch. 195, § 13, 12 Stat. 589, 592. The 1867 Act became law without President Johnson’s signature.

47. See Kobil, *supra* note 3, at 593.

48. In *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 370-71 (1866) (granting petitioner’s prayer; thus relieving petitioner of all penalties attached to the pardoned offense).



Fields stated the power is "unlimited, with the exception stated," and "extends to every offense known to the law."<sup>49</sup> Furthermore, "[t]his power of the President is not subject to legislative control. Congress can neither limit the effects of his pardon, nor exclude from its exercise any class of offenders."<sup>50</sup> In later cases, the Court further defined the scope of the pardon power.<sup>51</sup>

In *Bibble v. Perovich*, the Court recognized the intent of the founders when it outlined the basis for the pardon power.<sup>52</sup> It stated that a pardon is granted when, "it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."<sup>53</sup> The judiciary, concurring with the beliefs of the founders and the electorate's acceptance of the use of the power, certified the societal demand for pardons.

The President's power to regulate imprisoned individuals was certified, however many questions remain unanswered. What is the appropriate number of pardons a President should grant? What are the societal costs of issuing a shortage or surplus number of pardons? What are the effects of societal costs on a president's decision to grant a pardon? What are the effects of compensation given to a President in exchange for the issuance of a pardon? Economic principles can be used to help answer these questions.

### B. *Public Choice*

This section will give a general overview of the theory of Public Choice including the foundation and definition of this field, the general assumptions made by this theory, and the major assumption made about politicians within Public Choice.

Public Choice is a relatively new discipline that combines various academic fields, including political science, philosophy, and economics.<sup>54</sup> Consequently, the definition of this discipline is still in flux. Applications of Public Choice have been explained with regard to either

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49. *Id.* at 370.

50. *Id.*

51. *U.S. v. Klein*, 80 U.S. (13 Wall.) 128,142 (1872) (holding that the President could grant conditional amnesties); *Osborn v. U.S.*, 91 U.S. 474 (1875) (holding the pardon power included the power to remit fines and forfeitures); *Ex parte Grossman*, 267 U.S. 87, 98 (1925) (holding the pardon power extends to criminal contempt of court).

52. *See Bible v. Perovich*, 274 U.S. 480, 485 (1927)

53. *Id.*

54. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 6-7 (1991).

the "Virginia School"<sup>55</sup> or the "Chicago School"<sup>56</sup> and scholars within the field have debated the proper scope of this discipline. The entire field, however, can be traced to the early works of Gordon Tullock<sup>57</sup> and James Buchanan<sup>58</sup> who refused to accept the principle<sup>59</sup> that political actors, such as voters, members of political parties, and elected representatives, base their decisions solely on the benefit of society as a whole.<sup>60</sup> The most simplistic definition of Public Choice is "the economic study of non-market decision making, or simply the application of economics to political science."<sup>61</sup>

The theory of Public Choice is grounded in the assumption that there exists a political market in which political actors seek to maximize their own utility.<sup>62</sup> An individual's own economic well-being is the essential element in determining what decisions political actors will make. By applying this concept to political actions, the Public Choice theory attempts to describe the outcomes of political actions in

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55. See Dennis Muller, *The Virginia School and Public Choice* in *THE PUBLIC CHOICE APPROACH TO POLITICS*, 431-442 (1993) (differentiating the "Virginia School" from other schools of Public Choice because it not only sought to explain why political institutions produce undesirable results but also expanded the Public Choice field by describing how the institutions can be redesigned to produce better results). *Id.*

56. *Id.* at 432. Muller describes the "Chicago School" as willing to "extend the rational man assumption, as in rational expectations models, to the point where man is not only capable of behaving consistently when making choices, but possesses the powers bordering on clairvoyance." This school only seeks to explain why unfavorable results occur in political institutions. *Id.*

57. See Gordon L. Brady & Robert D. Tollison, *Introduction* to *ON THE TRAIL OF HOMO ECONOMICUS: ESSAYS BY GORDON TULLOCK* (Gordon L. Brady & Robert D. Tollison eds. 1994). Tullock was a co-founder of Public Choice Society, served as President of the Society, and has contributed over 140 articles and 15 books in economics and political science. *Id.* at viii, 4-5.

58. See FARBER AND FRICKEY, *supra* note 54 at 1. Buchanan was also a co-founder of the Public Choice Society. He brought the theory of Public Choice to the forefront when he was awarded the Nobel Prize in economics in 1986. *Id.* See also Charles K. Rowley, *THE CALCULUS OF CONSENT IN DEMOCRACY AND PUBLIC CHOICE* 42-60 (1987). Rowley discusses *Calculus of Consent*, the article cited as Buchanan's most important contribution when he was awarded the Nobel Prize.

59. See FARBER AND FRICKEY, *supra* note 54 at 44. The principle that politicians seek the public good stems from the Republicanism paradigm. In modern Republicanism theory, citizens "put aside their own interests and enter a public-spirited dialogue about the common good." *Id.* For a summary of modern republicanism see Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

60. DAVID B. JOHNSON, *PUBLIC CHOICE: AN INTRODUCTION TO THE NEW POLITICAL ECONOMY*, at 11 (1991).

61. DENNIS MULLER, *PUBLIC CHOICE II*, at 1 (1989).

62. W. MARK CRAIN & ROBERT D. TOLLISON, *Introduction* to *PREDICTING POLITICS: ESSAYS IN EMPIRICAL PUBLIC CHOICE*, at 5 (W. Mark Crain & Robert D. Tollison eds. 1990).

terms of individual self-maximization. In addition, this theory seeks to create usable economic models to predict political outcomes.<sup>63</sup>

Although this may be thought of as a very "crude" interpretation of our political system because the individual is portrayed as self-maximizing and not acting for the good of the society as a whole, Public Choice theorists highlight Adam Smith's interpretation of the role of self-maximization in the private market.<sup>64</sup> Smith's idea was that, "individuals motivated by self-interest and guided by private market restraints tend to promote the general welfare even though they do not intend to do so and are often unaware that their actions are promoting the public interest."<sup>65</sup> Analogizing this theory of the private market to the political market, it may be better for society if individuals were to act in the political sphere with the same self-interest as they display in the private realm.

A major assumption of the Public Choice theory, regarding the self-maximization of those elected to public office, is that individuals seek to remain in office indefinitely and therefore act in a way that will increase their probability of being re-elected.<sup>66</sup> Since elected officials seek the rewards of public office, the self-maximizing incumbent will continue to act in a way that will maximize his duration in office.<sup>67</sup>

### C. *Rent-Seeking*

One of the most popular areas of Public Choice literature focuses on the paradigm known as rent-seeking. Economists have discussed the concepts of rents in many different forms<sup>68</sup> and have generally

63. See HOWARD MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY: A THEORY OF SOCIAL CHOICE* 17 (1982). The theory of Public Choice has been attacked because it has been unable to account for many common political actions, most notably the concept of voting. Because of the large number of votes cast in an election, it is unlikely that a single vote will determine the outcome of the election. If the individual is self-maximizing, he will become a free-rider and not vote because of the opportunity costs associated with taking the time to vote. Yet millions of people still vote. In addition, the more a voter is educated, the more likely he or she is to vote. Theorists have written off the Public Choice Theory, stating that if it can not predict individuals desire to cast votes, how can it predict how the individual will vote. *Id.*

64. See generally, ADAM SMITH, *THE WEALTH OF NATIONS*. Adam Smith is known as the "Father of Economics."

65. See JOHNSON, *supra* note 60 at 12.

66. CRAIN & TOLLISON, *supra* note 62 at 13. See Richard E. Wagner, *Boom and Bust: The Political Economy of Economic Disorder*, in *THE THEORY OF PUBLIC CHOICE II*, 240-243 (1984). Wagner describes policies used by incumbents to assist in re-election bids. See also DAVID R. MATHEW, *AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH*, 3-28 (2000).

67. *Id.*

68. Robert D. Tollison, *Is the Theory of Rent-Seeking Here to Stay* in *DEMOCRACY AND PUBLIC CHOICE* 144. (Charles Rowley ed. 1989). Other types of rents that have been discussed include quasi-rents, monopoly rents, and inframarginal rents. *Id.*

defined a rent as "a return to a resource owner in excess of the owner's opportunity cost."<sup>69</sup> Rent-seeking applies the theory of rents to the political market, and is defined as the individual's use of governmental institutions to transfer wealth to themselves through legislation, regulation, and special benefits.<sup>70</sup> Individuals, often special interest groups, demand the rent and the political actors, who are in the position to provide the special benefits, are willing to supply the transfer of wealth for a certain price.<sup>71</sup>

Rent-seeking occurs because of the societal demand for the governmental institutions to create rules.<sup>72</sup> However, if society limits the areas in which governmental institutions regulate, rent-seeking could not take place in those areas. A societal demand for pardons must be established in order for the President to engage in rent-seeking. In addition, the executive branch must be the governmental institution delegated as the appropriate branch to execute the power.

Public Choice theorists are mostly concerned with the costs associated with rent-seeking.<sup>73</sup> As a result of rent-seeking, resources are taken from productive activities in order to acquire privileged positions.<sup>74</sup> In addition, once the position is gained, extra resources are spent to keep the position; this is often referred to as "rent protection."<sup>75</sup> The most common explanation of this phenomenon is illustrated by applying it to a monopoly situation. The social cost of a monopoly in the rent-seeking paradigm may include what was commonly perceived to be the transfer from the society to the monop-

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69. *Id.*

70. See Tollison, *supra* note 68, at 144. But see Douglas C. North, *Rent-Seeking and the New Institutional Economics* in DEMOCRACY AND PUBLIC CHOICE 163 (Charles Rowley ed 1989). North states modern rent-seeking analysis is deficient because it looks only at human behavior and not the institutional framework. He believes that the emphasis "should not be on the unique behavioral pattern of actors, but on the institutional structure that makes such activity profitable." *Id.*

71. An example of rent-seeking in the political market is when a corporation pays a "rent" to Congressmen in the form of financial campaign contributions, and in return, the corporation demands favorable legislation for them individually or the industry in general.

72. For example, if Congress was unable to create laws that effect a certain industry, such as the oil industry, it is unlikely that corporations within that industry would spend money on campaign contributions because they would not reap the benefits of favorable legislation.

73. See generally Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, W. ECON. J., 224-232 (June 1967); Gordon Tullock, *Rent-seeking as a Negative-Sum Game*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 16-36 (Buchanan, Tollison and Tullock eds. 1980).

74. In the campaign contribution example, resources are taken away from researching, marketing, or other productive activities and are given to lawmakers in order to buy legislation.

75. See Tollison, *supra* note 68 at 149.

list.<sup>76</sup> One scholar wrote that, "[r]esources will therefore flow into the activity of getting the monopoly and will continue their flow until the present discounted value of the resource investment equals the present discounted value of the monopoly."<sup>77</sup>

According to some theorists, the two "basic presumptions of rent-seeking theory are (1) that the expenditure of resources to gain a transfer is itself a social cost and that (2) the resulting market privileges or rent represent a welfare loss on consumers and taxpayers."<sup>78</sup> The variety of ways rent-seeking takes place includes, "sale of subsidies, tax privileges, price supports, tariffs, farm or import quotas, or licenses to the highest bidder."<sup>79</sup> These rather covert ways of granting rents occur so that the political officials are not under the same level of public scrutiny as if they blatantly sold monopolist or beneficial positions.

#### D. *Congressional Implications of Rent-Seeking*

The majority of the research conducted in this area has focused on the lobbying efforts of interest groups, rent seeking, and the willingness of Congress to supply the special benefits. Many interesting Public Choice theories have emerged regarding these entities, including the desire of interest groups for durable legislation.<sup>80</sup> The roles of the executive and judicial branch with regard to durability have been explored.<sup>81</sup> These studies focus on interest group concerns about the overturning of favorable transfers by future legislation. An interest group is obviously not going to spend as much money trying to gain less durable transfers and in fact, will be forced to spend more money protecting their interest if they gain a short-term transfer.

Many other Public Choice theories have been documented while studying the rent-seeking paradigm. These studies include the rela-

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76. If a corporation was granted a monopoly through Congressional legislation, which resulted in excess profits totaling \$20,000,000 a year; the corporation would spend up to that amount of money per year to keep the monopoly. This would be accomplished by supporting Congressmen, through campaign contributions, who would vote in favor of the monopoly.

77. GORDON TULLOCK, *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 98 (1980).

78. William C. Mitchell and Michael C. Munger, *Economic Models of Interest Groups: An Introductory Survey* in 35 AM. J. POL. SCI. 525 (1991).

79. *Id.*

80. Legislation is more durable the longer the duration of the benefit to the rent-seeker. If Congress was to grant a monopoly to a corporation for one year, the legislation would not be durable, and therefore, would not be as valuable as a grant of a monopoly for 20 years.

81. See William Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective* in 18 J. L.ECON. 875-901. Landes and Posner concluded that because the legislative procedures make the passage of legislation difficult and time consuming, and because "judges are merely agents of the current legislature," legislation is a fairly durable good. *Id.*

tionship between interest groups and the size of government,<sup>82</sup> logrolling,<sup>83</sup> and the effects of the size of the group seeking rent.<sup>84</sup> These issues, however, are beyond the scope of this article and the focus will now turn to the studies and conclusions of Glen Parker on rent-seeking and Congress.

Parker outlined the rationale of individuals who seek Congressional seats, discussed the effect rent-seeking has on the Congress, and introduced a theory on why Congressmen do not adversely impact interest groups in their final term of office.<sup>85</sup> Parker's analysis was chosen because it reflects the preferences of long-term Congressman, or in other words "career politicians."<sup>86</sup> In modern times, the majority of Presidents can be considered "career politicians," so it is likely that they will have preferences very similar to those of long-term Congressional officials.

Four basic assumptions about the politician are made in Parker's analysis of rent-seeking in Congress. First, like all Public Choice models, he assumes that the individual, in this case the legislator, is a utility-maximizer.<sup>87</sup> Second, he assumes that long service in politics is a reflection of an individual preference for intrinsic, as opposed to material, benefits.<sup>88</sup> The intrinsic returns of a politician may include national visibility, the power of the position, and the perception of being a dedicated public servant.<sup>89</sup> As Parker noted, it is very difficult to measure the exact preferences of a legislator because it would not be beneficial for him to expose a preference that might translate into a public perception of him as a "power" or "money" hungry individual.<sup>90</sup> He supported this assumption by showing that a politician experiences great opportunity costs, because compensation awarded in the public sector is far less than that awarded for a very similar job in

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82. See Dennis Mueller and Peter Murell, *Interest Groups and the Size of Government*, in *THE PUBLIC CHOICE APPROACH TO POLITICS*, 344-364 (1993). Mueller and Murell concluded, "interest groups are able to influence public politics in a manner as to lead to increased government size." *Id.*

83. See Dennis Mueller, *Public Choice: A Survey*, in *THE PUBLIC CHOICE APPROACH TO POLITICS*, 458-459 (Dennis Mueller ed. 1993). Logrolling refers to vote trading to express the intensity of preferences. *Id.* For a more detailed explanation of logrolling see JAMES BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT*, 42 (1962).

84. See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION*, 48 (1965). Olsen concludes that small groups are better able to mobilize resources to influence government. Large groups, on the other hand, must deal with free-rider problems. *Id.*

85. GLEN PARKER, *CONGRESS AND THE RENT-SEEKING SOCIETY*, 124-132 (1993)

86. *Id.*

87. *Id.* at 37 (defining a utility-maximizer).

88. *Id.*

89. PARKER, *supra* note 85, at 37.

90. *Id.* at 38.

the private sector.<sup>91</sup> In addition, if a legislator were interested only in monetary gain, their legislative career, due to disclosure regulations, would be short.

Parker's third assumption is that the value of the intrinsic returns that come from holding a political office increases with tenure.<sup>92</sup> This assumption is based on the fact that the longer a legislator is in office, the more notoriety he or she receives on a national level, which might include being labeled as a dedicated public servant or an expert in a certain area.<sup>93</sup>

The fourth and final assumption is that rent-seeking decreases the intrinsic returns of a legislator.<sup>94</sup> This assumption stems from the idea that as more rent-seeking occurs, politicians are perceived as desiring only the financial rewards of their position and no longer are concerned with the interest of the public at large.<sup>95</sup> Society then looks at politics and those who engage in political careers negatively.<sup>96</sup> Consequently, those individuals who would desire a political career because of the intrinsic rewards no longer seek public office, but instead look to gain these intrinsic rewards in other institutions. This creates a vicious cycle and in the long run, increases rent-seeking activities.<sup>97</sup>

Perhaps Parker's most interesting finding was that final term legislators did not participate in maximization of monetary returns, even when there was no expectation of future intrinsic returns.<sup>98</sup> This seems counter-intuitive considering the assumption that individuals are self-maximizing. However, he found that career politicians place great value on their reputations. This can be explained by the large sunk costs of career politicians, opportunity costs and the costs of being reelected are substantial. Upon exiting public service, the reputation of the individual is part of the intrinsic rewards of being a career politician. In addition, politicians who are perceived as having a 'ster-

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91. *Id.* at 39. See also Louis Lavelle, *The Gravy Train is Slowing*, BUS. WK., Apr. 2, 2001, at 44 (reporting that the five highest paid CEO's each make over 100 million dollars annually while the chief executive of the United States only makes \$400,000 annually).

92. See *id.*

93. PARKER, *supra* note 85, at 39.

94. *Id.*

95. *Id.*

96. *Id.*

97. See PARKER, *supra* note 85 at 80. See also Amihai Glazer, *On the Incentives to Establish and Play Political Rent-Seeking*, in 75 PUBLIC CHOICE 139-148 (1993) (stating that "when one candidate is expected to consider campaign contributions when he awards contracts, whereas the other candidate promises to avoid rent-seeking, then the latter candidate will receive no contributions, and will lose the election. The result holds even though the firms prefer that there be no rent-seeking.") *Id.*

98. See PARKER, *supra* note 85 at 82.

ling reputation' will benefit financially after they leave office, because many politicians do not totally retire. They can use their reputation to solidify a position as a public speaker or can work within an industry that benefited during their time in political office. As Parker stated, "[a]s long as retirees value their reputations because of the investments they have made, and the returns they expect to obtain, last-period problems should not appear with any regularity."<sup>99</sup>

There exists a demand, among special interest groups, for transfers of wealth and Congress is willing to participate in these transfers through legislation. The findings of Public Choice theorists in this arena can be useful in explaining and predicting the possibility of rent-seeking activities used to ensure presidential pardons. However, many of the collective action problems of Congress do not apply to pardons, because of the exclusive power of the President to grant pardons.<sup>100</sup>

Before discussing rent-seeking and the application to the pardon power, it is important to first point out the key difference between the rent-seeking of the legislative branch and the pardon power. As previously stated, a concern that interest groups have regarding the seeking of transfers is the durability of the legislation.<sup>101</sup> Legislation, although it does not regularly get overturned,<sup>102</sup> still has the quality of being reversed by either the legislatures or the judiciary. The pardon power, on the other hand, cannot be reversed,<sup>103</sup> so that those who are able to get the transfer through pardons can possess the wealth from the transfer indefinitely.

### III. ANALYSIS

#### A. *Economic Models*

The analysis of rent-seeking and the pardon power will need to be viewed with regard to three different models. The first model will determine the number of pardons that society demands and the effect of oversupplying or undersupplying by the President.<sup>104</sup> The second model will illustrate the societal demand for the services of the Presi-

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99. *Id.*

100. Article II, Section II, Clause I of the Constitution grants the President the right to grant pardons. See *infra* notes 46 – 79 and accompanying text.

101. See *supra* note 800.

102. See Landes & Posner, *supra* note 81.

103. See *supra* notes 48-533 and accompanying text.

104. See *infra* notes 10808-1411 and accompanying text (analyzing the "Societal Demand for Pardons Model" in relation to the number of pardons demanded by society and the resulting effects of over or undersupplying by the President).



dent after he leaves the oval office.<sup>105</sup> The third model will show the profits that the President can gain if he “sells” pardons.<sup>106</sup> These models are interrelated and will be discussed together in conjunction with Parker’s assumptions.<sup>107</sup>

### B. *Societal Demand for Pardons Model*

As previously stated, the rationale for pardons is to “unite the country” and to serve as a check on the judiciary branch.<sup>108</sup> The appropriate number of pardons to be granted is, therefore, the number of pardons that would successfully accomplish these objectives.<sup>109</sup> This model does not specifically address each individual whom is granted a pardon; rather it discusses the individuals in the aggregate, as a quantity. The outcomes predicted by this model assume that the President only grants pardons for the reasons outlined by the framers. However, because of the great deference that the public gives to the President,<sup>110</sup> it is likely that pardons are granted for other reasons.

The exact demand for pardons during a specific period is very difficult to determine because information pertaining to individual preferences for the use of the pardon power to serve as a check on the judiciary, or to “unite” the country, is not readily available. The actual demand function for the number of acceptable pardons that may be granted can only be realized after the President supplies the pardons and the public reacts to the use of the power. When deciding how many pardons to grant, the President must make an educated guess on the societal demand for pardons (“D<sub>s</sub>”).<sup>111</sup> The societal demand function for pardons will be rather normal, meaning neither extremely elastic nor inelastic.<sup>112</sup> This is grounded in the assumption that society will be willing to accept a small number of pardons, if the

105. See *infra* notes 1422-14646 and accompanying text (using the “Demand for Services of a President After Serving in Office Model” to show the societal demand for the President’s services once he leaves the oval office; focusing on the monetary returns the President can expect to receive).

106. See *infra* notes 14747-1500 and accompanying text (examining the “Maximizing Profits by Selling Pardons Model” in relation to the amount of profits the President is able to gain upon sale of pardons).

107. See *supra* notes 28-300 and accompanying text.

108. *Id.*

109. The effects of granting a favorable or unfavorable pardon that is outside the scope of two previously stated rationales for granting pardons will be discussed in the application of the models.

110. See DAHL, *supra* note 37.

111. The societal demand for pardons is labeled D<sub>s</sub> in Figures 1, 2, and 3.

112. Where the demand is neither extremely elastic nor inelastic, the slope of the societal demand curve will not be extremely high or low.

price to society is high, and a larger number of pardons if the price to society is low.

The President will also take into consideration the marginal cost of supplying pardons. Marginal cost is defined as the cost of producing one extra unit of output.<sup>113</sup> When the pardon power was initially established, the marginal cost looked like a classic marginal cost, u-shaped, curve.<sup>114</sup> The reason it was u-shaped is because of the “set up” cost of putting the power in place. This included the cost to society of spending time on creating the power, as well as the administrative and procedural costs.

Today, however, the marginal cost curve is more linear, because the costs associated with the time spent establishing the power are sunken.<sup>115</sup> The marginal cost of the President (“MC<sub>P</sub>”) is equal to the cost to the society, plus the opportunity cost of the President himself.<sup>116</sup> The cost to society will be equal to the opportunity cost of having the President partake in other presidential activities. Flowing from Parker’s second assumption,<sup>117</sup> the President’s opportunity cost is equal to the losses he endures as a result of spending time issuing pardons, rather than taking other actions that would increase his intrinsic returns.

The marginal societal cost (“MSC”) is also an important factor.<sup>118</sup> Marginal societal cost is defined as the total cost to society of producing an additional unit of output,<sup>119</sup> in this case a pardon. This is computed by adding the marginal private cost, MC<sub>P</sub>, to the costs involved in the production of the good.<sup>120</sup> The marginal societal cost takes into consideration the cost of having a President spend time granting pardons, instead of participating in other actions that are of “national importance”; however, it would include the opportunity cost of the President. Therefore, although the opportunity cost of the President will fluctuate, the MC<sub>P</sub> would be greater than the MSC.

113. S. CHARLES MAURICE & OWEN R. PHILLIPS, *ECONOMIC ANALYSIS: THEORY AND APPLICATION*, 93-95 (1986).

114. The curve is u-shaped because of the initial set-up cost. For example the cost of producing the first automobile in a factory is very high because it takes into consideration the cost of the factory, employees, etc. As more cars are produced the cost of the production of each car is reduced and the curve begins to have a positive slope.

115. The initial set-up, in this case the cost of setting up the government is sunken. The President does not have to set up the governmental structure and create the pardon power before he issues each pardon.

116. The marginal cost of the President is illustrated in Figures 1, 2, and 3, and labeled MC<sub>P</sub>.

117. See *supra* notes 87-97 and accompanying text.

118. Marginal societal cost is represented as MSC in Figures 1, 2, and 3.

119. KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF MICROECONOMICS*, G-8 (1999).

120. *Id.*

In order to gauge the value of the MSC, the existence of a negative or positive externality must also be explored. An externality exists when "the actions or decisions of one person or group impose a cost or bestow a benefit on second or third parties."<sup>121</sup> If a negative externality is present, the MSC will shift upward because an additional cost is levied upon the public.<sup>122</sup> On the other hand, if a positive externality is present, the MSC will shift downward because the public is bestowed a benefit.<sup>123</sup> The value of an externality is very difficult to calculate, however, it is likely to result in the production of too many, or too few, units.<sup>124</sup>

In the case of a pardon, the transaction occurs between the President and the individual whom is granted the pardon; society is a third party to the transaction. Society, as a whole, is better off if the President is able to grant pardons, because this check on the judiciary<sup>125</sup> and the ability to quell rebellions<sup>126</sup> reassures and strengthens the public's view of our system of government; similar to the effect of possessing a strong military defense.<sup>127</sup> This "feeling," created by the pardon power, is a by-product of the actual issuing of pardons and results in a positive externality, so that MSC is lower than the marginal private cost of the President.<sup>128</sup>

If the President correctly determines the demand for pardons, he will supply the quantity of pardons equal to the place where  $MC_P$  intersects the demand curve, a point that is above the MSC.<sup>129</sup> The value of  $P_2$ <sup>130</sup> minus  $P_1$ ,<sup>131</sup> which is equal to the distance between points A and B in Figure 1, is the value of the positive externality created by issuing  $Q_1$  number of pardons. Since the value of the externality is difficult to calculate, the President will not grant an efficient

121. *Id.* at G-4.

122. *Id.* at 375-378.

123. CASE & FAIR, *supra* note 119, at 375-78.

124. *Id.*

125. See *supra* notes 28-300 and accompanying text.

126. *Id.*

127. CASE & FAIR, *supra* note 119, at 387

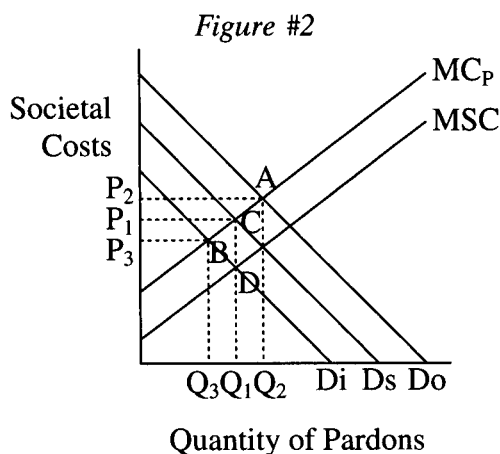
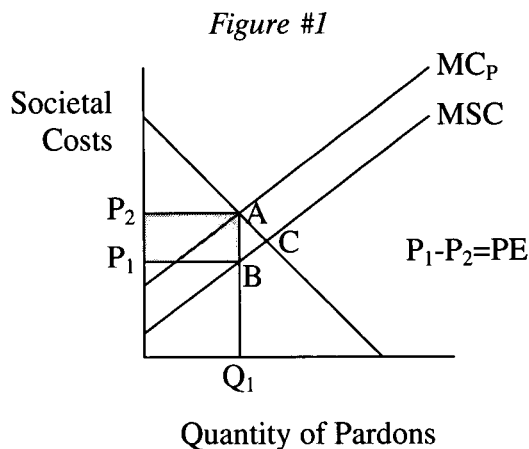
128. *Id.* at 376.

129. The President does have a monopoly over the pardon power; however, his marginal revenue created by issuing pardons is equal to the demand of society. This results because the President is a "career politician" and values the intrinsic reward of a good reputation. If he issues too many or too few pardons, with respect to the societal demand, his reputation will fall. In addition, as will be explained in Figure 4, the monetary rewards of post-office employment will be affected by the decrease in reputation.

130.  $P_1$  measures the cost to society of issuing pardons where the MSC intercepts the demand curve.

131.  $P_2$  measures the cost to society of issuing pardons where the  $MS_P$  intercepts the demand curve.

number of pardons. If this value could be determined, the President would grant the number of pardons equal to the point where MSC intersects the demand curve, point C in Figure 1.



From period to period, the demand for pardons will likely shift in or out, depending on public perception of the need for pardons.<sup>132</sup> These shifts are illustrated in Figure 2. If the demand shifts out from  $D_s$  to  $D_o$ , the quantity supplied will increase from  $Q_1$  to  $Q_2$ , and the cost to society will also increase from  $P_1$  to  $P_2$ . A likely cause of this demand shift would be a perceived harshness of the judicial branch.<sup>133</sup> More

132. This is based on the assumption that the demand for pardons is based on the public's opinion and the acceptable uses of the pardon power outlined by the framers and the judiciary.

133. See *supra* notes 28-300 and accompanying text. The framer's intended for the pardon power to be used in this type of situation. *Id.*

people would demand pardons to remedy the excessive punishments given and the President would then respond through the issuance of more pardons.

There is also the possibility of a decrease in the demand for pardons, which would result in the exact inverse of an increase in the demand. This is illustrated in Figure 2, with an inward shift of the demand curve from  $D_s$  to  $D_i$ . The number of pardons granted would be reduced from  $Q_1$  to  $Q_3$ , and the societal cost would decrease from  $P_1$  to  $P_3$ . A possible cause of this decrease would be public opinion that the President was abusing his power, or public contentment with the actions of the judiciary.<sup>134</sup> The President would respond by issuing fewer pardons.

It is not likely that the President will guess the exact quantity of pardons demanded by the public.<sup>135</sup> The demand may be overestimated and result in more pardons than demanded, which is represented by point A on Figure 2. The President estimated a demand of  $D_o$  and the actual demand is  $D_s$ . The cost to society of this error is the difference between  $P_1$  and  $P_2$ . The President may also underestimate the demand, represented in Figure 2 by the shift from  $D_i$  to  $D_s$ . Point B represents the number of pardons granted due to this estimation. The cost to society of this underestimation is the difference between  $P_1$  and  $P_3$ . Note that the cost to society of either a small over or under estimation is still less than the value of the positive externality that is created, which is the distance between points C and D.

The utility-maximizing President<sup>136</sup> will attempt to accurately assess the demand, because a failure to do so will result in a negative reputation.<sup>137</sup> If there is a gross misunderstanding of societal demand, the President will be seen as improperly executing his official duties. Due to the fact that the President values the intrinsic rewards of political office,<sup>138</sup> he will seek the most accurate assessment of the demand. A small misunderstanding of the demand, however, will not cause major harm to the reputation of the President; a direct result of the great deference given to the President.<sup>139</sup> Since he is seen as taking actions that are in the best interests of the country,<sup>140</sup> a small surplus or

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134. *Id.*

135. Currently there is no public survey on each application for pardon that is reviewed by the President.

136. See *supra* notes 87-97 and accompanying text.

137. This negative reputation would be based upon the public's perception that the President was abusing his power.

138. See *supra* notes 87-97 and accompanying text.

139. See *supra* notes 36-38 and accompanying text.

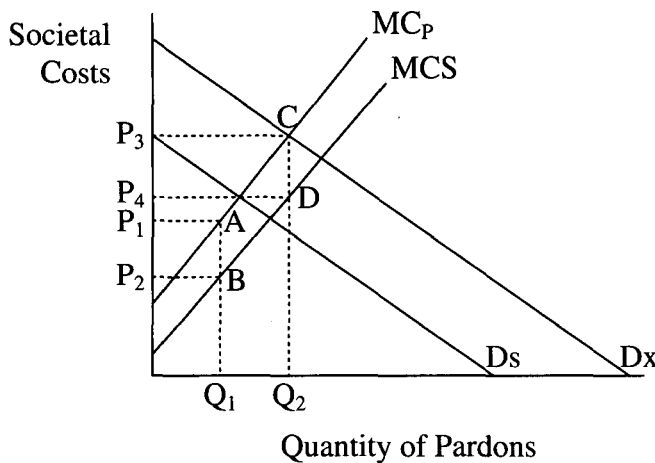
140. *Id.*

shortage of pardons granted will not have an adverse effect on his reputation.

Even with the deference given to the President, a great disparity in the quantity demanded will likely have a negative effect on the reputation of the President. There is a demand for pardons, so issuing too many or too few, will prompt the public to question the President's actions and will taint their view that the President is acting with their best interests in mind.<sup>141</sup>

An interesting aspect of this model is that the increase in demand for pardons causes the pardon power's positive externality to have a smaller value. As the demand increases, as seen in Figure 3 from  $D_s$  to  $D_x$ , the value of the positive externality remains the same, but the cost to society increases. The distance between  $P_1$  and  $P_2$  is equal to the distance between  $P_3$  and  $P_4$ .  $P_1$  is the total cost to society with the demand of  $D_s$ , while  $P_3$  is the total cost to the society with the demand of  $D_x$ . Where the demand is lower,  $D_s$ , the positive externality, the distance between  $P_1$  and  $P_2$ , represents a larger portion of the total cost than when the demand is at  $D_x$ . The higher the cost to society, the lower the percentage the positive externality represents.

Figure #3



This relationship between societal cost and positive externality makes intuitive sense. The more pardons demanded, the less the society believes the system of government is working, so the value of the pardon power is diminished. The security of having an adequate

141. See *supra* note 3. President Ford's popularity decreased significantly after pardoning former President Nixon.

check on the judiciary remains the same, but the increase in excessive punishments creates a proportionately greater uncertainty about the effectiveness of our government. This also makes sense in terms of the use of the pardon power to "unite the country."<sup>142</sup> The more pardons demanded for those who were not loyal to the country, or caused uprisings, would mean there is a question about the foundations on which the country stands. The positive externality of faith in the system would be diminished.

In summation, the total number of pardons that the President grants can be seen as a function of his own self-benefit.

### *C. Demand for Services of a President After Serving in Office Model*

The second model is a demand function for the services of the President, after he completes his term in office, and focuses strictly on the monetary returns he is expected to receive. Similar to congressmen, the President commonly uses his notoriety to perform services, such as speaking engagements, in which a fee is paid for the service. Opposed to congressmen, a former President is less likely to go into the private sector and work for those groups that benefited from his term in office. It is important to note that the speaking skills of a former President could increase the demand, however, by virtue of being the President, there is still a consistent demand for these services.

This function is normal, since the willingness of parties to pay for the services of the former chief executive decreases as the price of the service increases, and vice versa.<sup>143</sup> Since the President is self-maximizing, he will set the price at the point in which he will make the largest profit.<sup>144</sup> If the price is set at  $P_1$ , the largest rectangle under the demand curve is created and the President is therefore making the largest profit.<sup>145</sup>

This may not seem to make sense, since the "career politician" values the intrinsic rewards more than material rewards. A former President, however, has already established his reputation with the label of being a dedicated public servant. These intrinsic rewards, especially if the President continues to be active in the public sector, cannot be taken away from the President after he leaves office, barring a major scandal. He has maximized his intrinsic rewards, and as a utility maxi-

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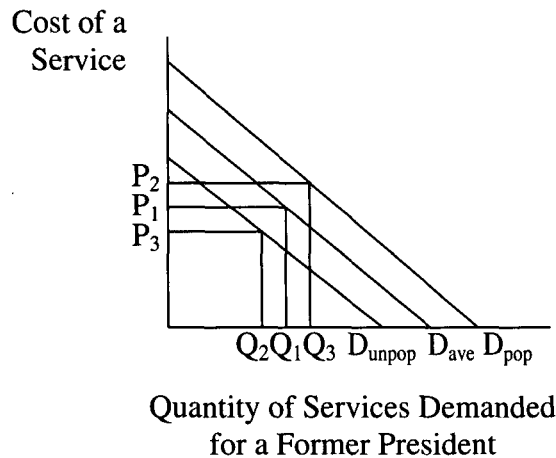
142. See *supra* notes 28-30 and accompanying text.

143. This function is represented in Figure 4 as  $D_{ave}$ .

144. This price is represented by  $P_1$  in Figure 4 and is the profit maximizing point.

145. The profit realized by the President is calculated by multiplying price by quantity and is maximized at Point  $P_1$ .

Figure #4



mizer, he would desire to maximize his material rewards. This follows the same reasoning as to why a congressman would not participate in actions that might adversely affect interest groups that he had aided.<sup>146</sup> Maximizing material rewards by securing future earnings would be expected from a self-interested individual.

#### D. *Maximizing Profits by Selling Pardons Model*

The third model represents the profit that a President could receive if pardons were sold to the highest bidder. The demand curve is again normal, so that as the price of a pardon decreases the number of those willing to buy a pardon increases.<sup>147</sup> Due to the lack of checks on the pardon power,<sup>148</sup> the President could set a price for pardons that would maximize his profits. This price would be at the point where the x-axis meets the demand curve to form the largest rectangle box.<sup>149</sup> The quantity supplied,<sup>150</sup> would be at the point where the largest rectangle box that could be drawn would meet the y-axis.

Note that this situation does not take into consideration the willingness of those to pay for the refusal of a pardon, such as a victim's family. The President would be better off if he sold the rights to issue a pardon. This would be done on an individual basis, so the true preferences of the individuals would be displayed and the President would gain financially from it. In this situation, the President could capture

146. See *supra* notes 98-99 and accompanying text.

147. This is illustrated in Figure 5 as  $D_{\text{pardon}}$ .

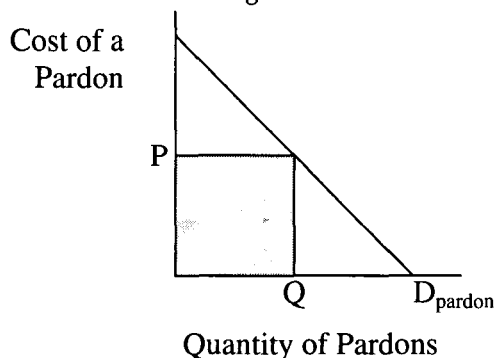
148. See *supra* notes 41-53 and accompanying text.

149. This is represented at P in Figure 5.

150. The quantity supplied is labeled Q in Figure 5.



Figure #5



the entire area under the demand curve. He would obviously be the individual who would have to issue or refuse to issue the pardon, but the rights would be very valuable nonetheless.

#### IV. IMPACT

These three models are intimately related when applying the rent-seeking paradigm to the pardon power. To illustrate rent-seeking and the pardon power, three different examples will be used. The first example will discuss the effects of small surpluses or shortages in pardons that the President supplies.<sup>151</sup> The second example will look at the effect of the President's reputation when he leaves office.<sup>152</sup> The third example will depict the effect of the term limit on the President, as opposed to that of Congressmen.<sup>153</sup>

As previously stated, small surpluses or shortages will not affect the President's reputation if the pardons are granted either to unite the country or to remedy a harsh judicial sentence.<sup>154</sup> Therefore, the demand for the service of the President, after he leaves office, will not be shifted inward or outward.<sup>155</sup> The President will be in a good position to maximize both the intrinsic rewards of being a President and the monetary rewards that are realized when the President completes his term in office. However, society's great deference to the President may lead to speculative pardons or to the refusal of pardons.

151. See *infra* notes 154-160 and accompanying text.

152. See *infra* notes 160-161 and accompanying text.

153. See *infra* notes 161-163 and accompanying text.

154. See *supra* note 29 and accompanying text.

155. See *supra* notes 132-136 and accompanying text (concluding that the utility-maximizing President will attempt to accurately assess the quantity of pardons demanded by the public to avoid a possible resulting negative reputation for failing to accurately assess the public's demand).

If a limited number of pardons were granted or refused, and the President gained monetarily from his decisions, it would not be likely to influence his reputation in a positive or negative manner. In referring to Figure 2, if C represents the number of pardons demanded, and the President supplied either A or B number of pardons, there would be a cost to society, but this value would still be less than the positive externality created.<sup>156</sup> The President could be paid for the risk he took for issuing or not issuing a certain number of pardons, and maximize his material rewards. This, however, assumes that the general public does not have knowledge of the money supplied to the President in return for his service. If the public knew he “sold” pardons, it would have a negative effect on his reputation, which would result in a decrease in the demand for his services after he leaves office.<sup>157</sup>

This brings forth an important issue regarding the accessibility of information. As shown in the Congressional sphere, short terms result from those who sought monetary rewards, because of disclosure rules.<sup>158</sup> The President, however, has a right to withhold certain information if it is of national importance.<sup>159</sup> Obviously a meeting with an individual about the selling of a pardon is not of national importance, however, there exists an area in which the President can hide from public scrutiny and therefore, keep a solid reputation. He will be able to have both the monetary rewards for granting or limiting pardons and for his services after office.

The previous example only took into consideration a presidential pardon based upon a justification of “uniting the country” or providing a check on the judicial branch. Given the public’s deference to the President, a pardon may be granted that neither of these rationales can justify. If the public were informed about a pardon that looked like an abuse of presidential power, the demand for the services of the President after office would be diminished, and consequently, the future monetary returns of the President would also fall. A President who grants only one pardon too many, but in granting the pardon on the basis of an unacceptable rationale abused his executive power,

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156. See *supra* notes 129-132 and accompanying text.

157. See *supra* notes 129-136 and accompanying text (explaining the difficulty of granting an efficient number of pardons, shifts in the demand for pardons, and the societal costs associated with such shifts).

158. See *supra* notes 91-92 and accompanying text (discussing how the compensation awarded in the public sector is much less than the compensation awarded for a similar job in the private sector).

159. See Johnson & Smith, *supra* note 36 at 914.

may suffer a substantial loss in both his intrinsic and monetary returns of being a politician.<sup>160</sup>

The reputation of the President is an important factor in determining if he is likely to participate in rent-seeking, because his reputation has a direct correlation to the demand for his services after he leaves office. If the President is held in high-esteem, it is unlikely that he would participate in rent-seeking. The high public perception may increase his demand for  $D_{ave}$  to  $D_{pop}$  in Figure 4, so that the area of  $P_2BQ_2$  minus the area of  $P_1AQ_1$  would represent his monetary gain. A popular President would be risking substantial intrinsic rewards, his reputation, and monetary rewards, (the decrease in profit after office resulting from a downward shift of the demand curve) if he were found to have participated in rent-seeking while executing his pardon power.

A President's decision to participate in rent-seeking hinges on his probability of getting caught. If the public discovered that he 'sold' pardons, his reputation, the intrinsic reward of being President, and the demand for his services (the monetary rewards), would be diminished, shifting from  $D_{pop}$  to  $D_{ave}$  or even lower. The loss of profits is illustrated in Figure 4. The President would not be participating in utility-maximization and therefore, his actions would not conform to Public Choice.

The number of pardons 'sold' may not have a direct correlation with the decrease in the reputation of the President. If it was discovered that the President sold ten pardons for one dollar each, the demand for his services after leaving the oval office may decrease slightly. However, since the value of each pardon is only one dollar, the pardons would likely be justifiable and the public could accept the reasons for granting the pardons. On the other hand, if a single pardon was sold for one million dollars, the demand for the President is likely to decrease greatly. Since the value of the pardon was very high, the public will perceive that the President greatly abused his executive powers. The reputation of the President will decrease and therefore, the demand for his services after office will be reduced.

If a President were viewed poorly, however, a certain level of rent-seeking may occur. Note that a President 'viewed poorly' could be a single-term President who was defeated in the election following his

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160. See *supra* notes 1411-1422 and accompanying text (commenting on how issuing too many pardons will cause the public to question the President's actions as well as taint the public's view that the President is not keeping the best interest of the public in mind when taking such actions).

first term, or a President who is not viewed highly in public opinion polls.

The reason a President, in this situation, would participate in rent-seeking is for the exact same reason that a popular President would not, maximization of both intrinsic and monetary rewards. The intrinsic rewards of an unpopular President are significantly smaller than those of a popular President, because of the diminished reputation.

The diminished reputation may result in a smaller demand for the services of the President after leaving the oval office.  $D_{unpop}$  in Figure 4 represents the demand for an unpopular President. Since the President was unpopular, he would lose profits equal to rectangle  $P_1AQ_1$  minus  $P_3CQ_3$ . The President would desire to recoup the lost benefits of the smaller demand by 'selling' pardons.

This could occur in two different ways. First, the President could 'sell' a few pardons to the highest bidders, and recoup his monetary loss from decreased demand. This, however, would decrease his demand even more, because of a decrease in his reputation, which would result in a further need to sell more pardons. A vicious cycle would be created.

Another manner, in which a President could recoup the benefits, is by increasing his popularity and reputation in an effort to shift the demand for his services. This could be done by granting pardons, not demanded by the public to be a check on the judiciary or to unite the country, but popular to the majority of the country. This may include a pardon to a rock star type figure. This action would be done in hopes that the pardon would increase the popularity of the President, and shift his demand outward, to the point where the average presidential demand is located.

A third issue that arises from rent-seeking and the pardon power is the effect of term limits. The President is limited to two four-year terms, whereas some Congressmen are able to serve indefinitely.<sup>161</sup> Congressmen in their last term are not likely to act any different toward rent-seekers<sup>162</sup>

However, there are some key differences between a former Congressman and a President. First, a Congressman can make a real decision to retire. A President could also make a decision to retire, however, his party would view him negatively if he represented their best chance to win an election. If he represented the party's best chance to win an election, he was most likely a popular President, and

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161. See U.S. CONST. art. II, § 1, cl. 1

162. See *supra* notes 87-97 and accompanying text.

if he didn't represent their best chance to win, he was likely an unpopular President. A negative reception to his decision to retire would decrease his demand after office. A President is forced to stay in office even if he feels his intrinsic rewards are maximized.

Congressmen, as opposed to a President, have more opportunities, if they are voted out of office or retire, for material and possible future intrinsic rewards. Former Congressman can run for another office, even the presidency, or be placed in cabinet positions by a President.<sup>163</sup> There is still an area in which the intrinsic rewards of holding a public office are available. A former President cannot run for President again, and the intrinsic rewards of holding a lower office are small.

Since term-limits create fewer material and intrinsic benefits for former Presidents than for Congressmen, the reputation of a President will be the most influential determination of whether or not they participate in rent seeking.

## V. POSSIBILITY FOR REFORM

The perceived abuse of the pardon power<sup>164</sup> has resulted in a call for reform. The major arguments surrounding pardon reform focus on preventing presidents from covering up illegal activity and preventing the possibility of a president pardoning himself. The arguments in both areas are applicable to rent-seeking because, as illustrated in the application of the economic models, the president would seek to cover up his issuance of pardons for a fee, and if it was discovered that he sold the rights to a pardon, he may try to pardon himself.

After the Watergate scandal, Congress enacted the Ethics in Government Act of 1978.<sup>165</sup> This act empowered an independent counsel to investigate and prosecute the misconduct of government officials, including the President.<sup>166</sup> Since its enactment, only President Carter was not investigated concerning his issuance of pardons.<sup>167</sup> The effectiveness of this act, however, is suspect because of the President's ability to classify information as 'concerning national importance'—a President may still be able to hide his own criminality.

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163. John Ashcroft, a former Congressman from Missouri was appointed Attorney General by George W. Bush.

164. See *supra* notes 1-3 and accompanying text (noting the controversy and criticism associated with the pardons granted by former Presidents Ford, Carter, George Bush, Sr., and Clinton).

165. 28 U.S.C. §§ 591-599 (1982).

166. *Id.*

167. See Johnson & Smith, *supra* note 36, 929 n.124.

Since the Supreme Court has ruled that Congress is unable to limit the pardon power through legislation,<sup>168</sup> a constitutional amendment would need to be ratified, which can only be initiated by Congress or by two-thirds of the state legislatures.<sup>169</sup> Although the amendment process is slow and relatively easy to block,<sup>170</sup> the major problem with pardon power reform is determining what means of limiting the pardon power should be included in the amendment.

Some scholars, concurring with Martin's motion at the Constitutional Convention,<sup>171</sup> believe that the pardon power should only be exercised after conviction.<sup>172</sup> There are two reasons a post-conviction limitation is believed to be proper. First, a pre-conviction pardon would hinder and undermine the judicial system. As one scholar stated, "a pardon should not be granted until the courts have tried to achieve justice and have failed."<sup>173</sup> In addition, "a pardon is often granted to adjust a sentence . . . [and] until [it] is passed, no one knows what adjustment needs to be made."<sup>174</sup>

The second rationale for a post conviction limitation is to prevent the president from issuing pardons to influence testimony and conceal misconduct. President George Bush, Sr. allegedly pardoned individuals in the Iran-Contra Affair to prevent exposure of his own misconduct.<sup>175</sup> If trials were required, a full investigation of the allegations would take place and if a president were involved in any wrongdoings, the information would be publicized.<sup>176</sup>

There are a number of positive effects stemming from this proposal. First, because the public, including the media, would be able to scrutinize the President's rationale, the number of unjustified pardons would likely decrease.<sup>177</sup> In addition, if the President issued an indefensible pardon, Congress could impose the constitutional sanction of impeachment.<sup>178</sup>

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168. See *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 370-71 (1866) (upholding the President's unconditional power to grant pardons).

169. See U.S. CONST., art. V.

170. See Duker, *supra* note 133, at 537. After President Ford pardoned Nixon, Walter Mondale (D-Minnesota) proposed a constitutional amendment that would allow Congress to veto a pardon with a two-thirds majority in the House and Senate. The proposal was never fully considered.

171. See *supra* note 244 and accompanying text.

172. See Johnson & Smith, *supra* note 36, at 924-925. See also KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST, 217-225 (1989).

173. See MOORE, *supra* note 172, at 218.

174. *Id.*

175. See *Walsh Soldiers On*, *supra* note 4 and accompanying text.

176. See Johnson, *supra* note 36, at 924.

177. See MOORE, *supra* note 172, at 220.

178. *Id.*

The ability of Congress to impeach a President for abusing his executive power is the strongest and most used argument of those who believe the pardon power should not be changed and should remain just as the founders wrote it.<sup>179</sup> Not only could a President be impeached and ousted from office for abusing his power, but could also be impeached after leaving office and therefore, be stripped of his pension and entitlements.<sup>180</sup> The supporters of the current pardon power point out that two state governors have been impeached following the sale of pardons; James Ferguson of Texas was impeached in 1917 for selling pardons<sup>181</sup> and J.C. Walton of Oklahoma was impeached in 1923 after he sold pardons to political allies.<sup>182</sup>

The Public Choice Theory, in conjunction with the economic models, provides an economic perspective of ways to reform the pardon power. Considering the fact that the President is both an intrinsic and material reward maximizer,<sup>183</sup> reforms should take place that require the President to give the public information on his rationale for granting pardons. If the public knows why the President granted each pardon, they would take those factors into consideration when forming an opinion about the President. This opinion would be reflected in the reputation of the President. Since the reputation of the President helps determine the demand for his services after he leaves office, he will have to give solid reasons for granting pardons in order to preserve his reputation. Therefore, the probability of abusing the power would be reduced. Although the marginal cost of the President will increase, the positive externality will also increase, because the people will have an increased faith in our system of government. It is unfortunate that the pardon power has been abused to the extent that a reform of the pardon power is demanded.

## VI. CONCLUSION

The debate over the proper scope of the pardon power has extended over 225 years. Sherman<sup>184</sup> and Martin<sup>185</sup> were the first to challenge the chief executive's sole power to grant pardons. Although there was little discussion over the proper scope of the pardon power

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179. *Id.*

180. See Kobil, *supra* note 3, at 779.

181. See Coleen Klasmeir, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 N.165 (1995).

182. See 3 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 150-153 (1939).

183. See *supra* notes 86 and accompanying text.

184. See *supra* note 22 and accompanying text.

185. See *supra* note 23 and accompanying text.

at the Constitutional Conventions,<sup>186</sup> the forethought of those two men is amazing. Today, many are calling for reforms that reflect their concerns.

The pardon power is being scrutinized again following President Clinton's questionable pardons in his last days in office. Similar scrutiny over the power was discussed following pardons by Presidents Nixon, Ford, and George Bush, Sr.<sup>187</sup> The pardon power is a hot topic, as it has been in the past, however there has been no change to this power. It is likely that the pardon power issue will only echo through the halls of Congress if George W. Bush or his successor issues a questionable pardon.

This article explored the economic reasons why a President would issue a pardon and presented different models to help predict the quantity of pardons a President will issue. The President seeks to maximize his intrinsic and material reward, and therefore will seek to issue the number of pardons demanded by the people in order to either 'unite' the country or remedy excessive judicial punishment. On occasion, however, former Presidents have issued questionable pardons that do not fit either rationale, as the framers outlined and the judiciary adopted, and consequently have gained personally from the decision to grant a pardon. This result is expected because the President seeks to maximize his own utility. The issuance of questionable pardons is a direct result of the great deference given to the President, coupled with the natural instincts of the economic man. Pardon power reform is not likely to occur in the immediate future because of the amount of time needed to not only pass a constitutional amendment, but more simply, to reach an agreement about the way in which the pardon power should be reformed.

Even if reforms do not occur, it is likely that the mass media and the information age will help limit the abuse of the pardon power. The self-maximizing President will not issue questionable pardons if he believes the mass media will scrutinize his decisions, because the result would be a diminished reputation. A decrease in his reputation would result in fewer material rewards after office. The power of the media to expose the actions of the President should limit rent-seeking within the pardon power. If this occurs, the power will remain as "benign" as Hamilton predicted.<sup>188</sup>

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186. *See supra* notes 14-15 and accompanying text.

187. *See supra* notes 2-4 and accompanying text

188. *See supra* note 30.



